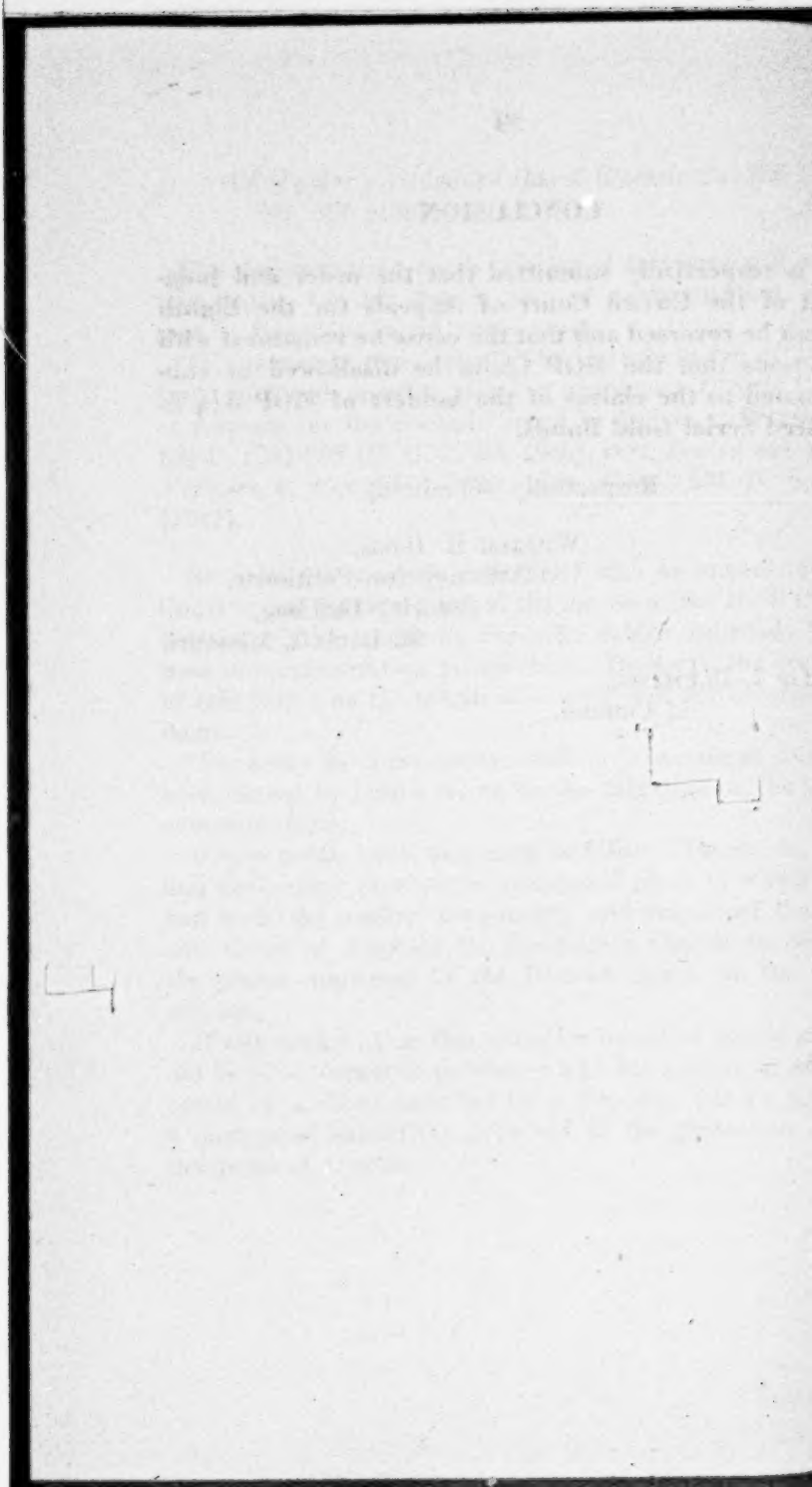

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

ANDREW W. COMSTOCK, ETC.,
Petitioner,

vs.

GROUP OF INSTITUTIONAL INVESTORS, holding First and Refunding Mortgage 5% Gold Bonds of Missouri Pacific Railroad Company, et al.,
Respondents.

No. 451

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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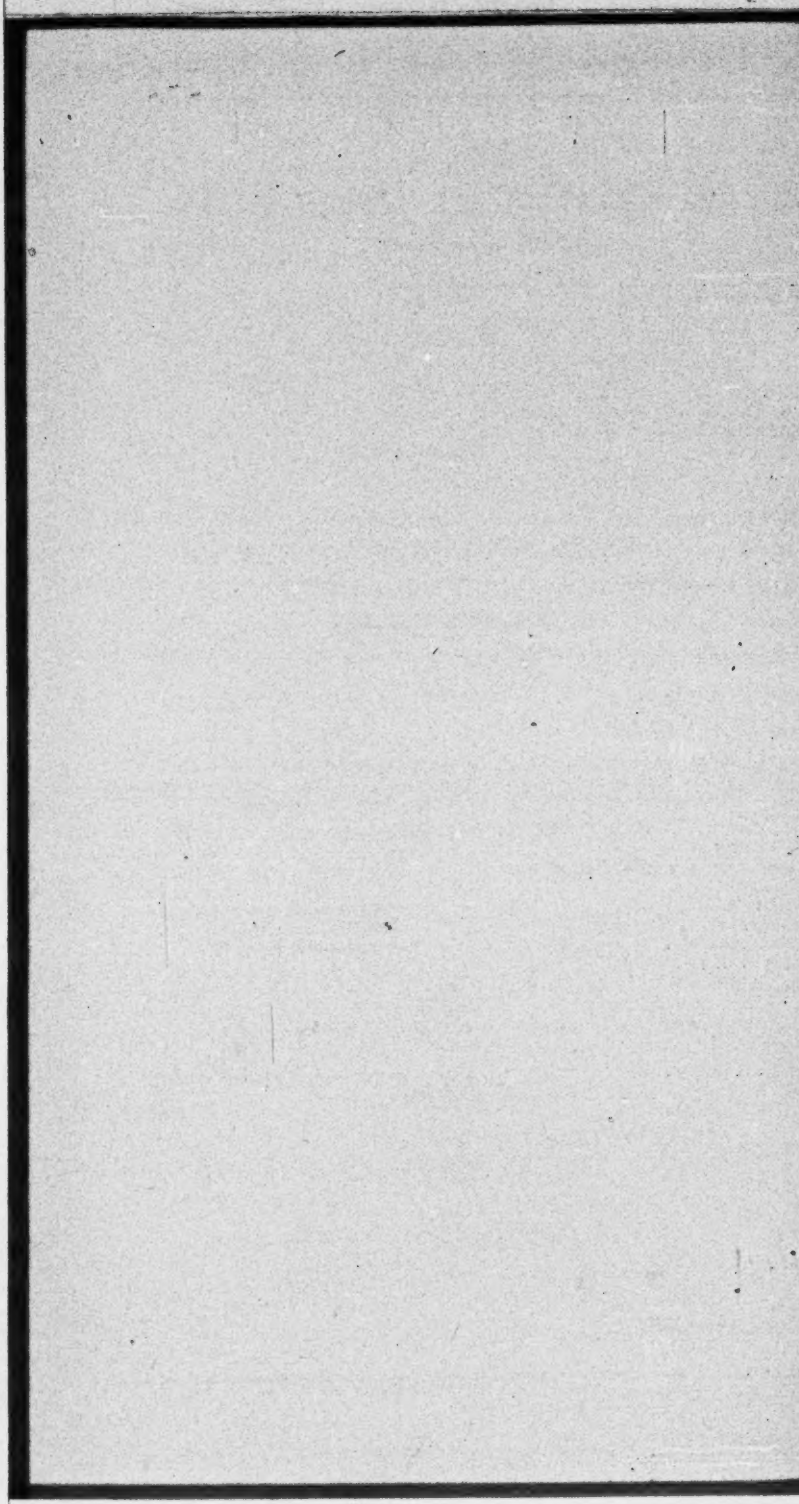

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Respondents file this brief in opposition to the petition of Andrew W. Comstock for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Eighth Circuit which affirmed a separate order of the District Court overruling Comstock's Objection 19 and held that the intercompany claim was valid and ranked in priority to the common stock of the New Orleans.

Opinions Below

Circuit Court —*Comstock* v. *Group of Institutional Investors, et al.*, 163 F. 2d 350 (C.C.A. 8th, 1947) (R. IV, 13-27).

District Court—*In re Missouri Pacific R.R. Co.*, 64 F. Supp. 64 (E.D. Mo. 1945) (R. 1089).

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended. 28 U.S. C.A. §347(a).

POINT I

The petition fails to set forth grounds for the exercise by this Court of its discretionary power to review the decision of the Circuit Court of Appeals.

A. The Petition presents a factual controversy upon which two courts have ruled adversely to the Petitioner.

The District Court made detailed and specific findings of fact (R. 8-30). In his appeal to the Circuit Court of Appeals the petitioner made 115 assignments of error in his points on appeal, most of which pertained to the findings of fact of the District Court (R. 40). However, in his brief and in argument before the Circuit Court of Appeals the petitioner made no effort to sustain his assignments of error as to the findings of fact. Instead he proceeded to argue his case upon his own statement of the facts which differed radically from the findings made by the District Court. The Circuit Court of Appeals recognized that it was bound by the District Court's findings unless they

were shown to be clearly erroneous (Federal Rules of Civil Procedure, Rule 52(a)). After careful examination of the record the Circuit Court of Appeals concluded that the findings of fact should not be disturbed. With respect to these matters the opinion of the Circuit Court of Appeals, referring to Judge Moore who presided in the District Court proceedings, states:

> "* * * His findings of facts and conclusions of law were drawn with care and thoroughness, and appear to us to be responsive to all the issues presented by the objections here involved and the evidence that was adduced, and the appellant has not called our attention to any refusal on the part of the court to make findings in respect to any other issues claimed to have been presented. * * * (R. IV, 23)
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> "On this appeal the case is stated for the appellant in substantial disregard of the findings of the trial court and practically as though the case was here to be tried by this court de novo on the voluminous evidence. This court must decline to assume that function. We may not set aside the findings of facts which have been made by the trial court, who in this case had more than ordinary opportunity to judge of the credibility of the witnesses, unless such findings were clearly erroneous. F.R.C. 52a; General Orders in Bankruptcy Nos. 36 and 49, 11 U.S.C.A. following Section 53. Though we have considered the appeal sufficient in form to require a complete study of the record and evidence, we are forbidden by the rule to upset those findings which are supported by substantial evidence and are not clearly erroneous nor induced by error of law. * * * " (R. IV, 25-26)

The petitioner in his petition for certiorari and brief has proceeded in much the same manner as he did in the Circuit Court of Appeals. He has stated his own version of the facts in "substantial disregard" of the findings of

fact. It is significant that in his petition for certiorari and brief there is only one citation to the findings of fact and only one additional reference to them is made. The petitioner's brief asserts:

> "Petitioner seeks no re-examination of the facts. To a remarkable extent the facts, *arising* almost entirely from books of account and corporate records, are undisputed." (Italics supplied) (Brief, 33)

Heretofore petitioner has been unwilling to accept the facts as shown in the books of account and records to which he refers. He has contended throughout that the books and records in evidence were improperly kept and concealed the true condition of the New Orleans (R. 240, 516; Par. 73, R. 50). The statement of facts in the petition and brief, which conflicts in many important respects with the findings of fact, is a refutation of the petitioner's assertion that there is no dispute as to the evidence. It is clear that the petitioner is unwilling to present his case to this Court on the facts as found in the District Court. Of necessity this is true. The findings of fact of the District Court do not warrant the granting of the subordination which the petitioner seeks.

A petition for review which merely presents what is essentially a factual controversy fails to state grounds which justify this Court in exercising its power to grant a review.

General Talking Pictures Corp. v. *Western Electric Co., et al.*, 304 U.S. 175, 178 (1938);

Wisconsin Electric Co. v. *Dumore Co.*, 282 U.S. 813 (1931);

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924).

This is especially true where the petitioner fails to point out wherein the trial court erred in making findings of fact.

B. No Conflict of Decisions is Presented.

The petitioner contends that the decision of the Circuit Court of Appeals is in conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit in *In re Commonwealth Light & Power Co.*, 141 F. 2d 734 (1944) and with the decision of this Court in *Taylor* v. *Standard Gas & Electric Co.*, 306 U.S. 307 (1939). (See Questions 1, 2 and 3, Petition pp. 13-14 and Reasons 1, 2 and 3, Petition pp. 14-15.)

This contention is based in part on petitioner's assertion that the decision in each of these cases required subordination of the claim of an insolvent parent against a subsidiary (Questions 2 and 3; Petition pp. 14, 28). The petitioner has misconceived the decision of the courts below. The holding was that the Missouri Pacific in its dealings with the New Orleans had complied with its fiduciary obligations as a controlling stockholder (CL. 11, 13, R. 32, 33; FF. 33, R. 24-25). Because there was no ground for subordination, it was unnecessary for the courts below to decide the interesting questions set forth in paragraphs 2 and 3 at page 14 of the petition.

Petitioner's statement of the facts is an effort to fit them into the mold of the decisions in the *Deep Rock* and *Commonwealth* cases. His method is to select facts from those cases for special emphasis and to compare them with his version of the instant case which is incomplete and differs substantially from the findings of fact and the evidence. Such a method fails to establish a conflict of decisions. In reality the asserted conflict "arises from differences in states of fact and not in the application of

a principle of law." See *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U.S. 813 (1931). This is particularly true of cases such as *Deep Rock* and *Commonwealth*. In those cases it was the cumulative effect of all the facts which controlled the decisions. This Court in *Pepper* v. *Litton*, speaking of the subordination granted in the *Deep Rock* case, stated:

> "* * * This was based on the equities of the case—the history of spoliation, mismanagement and faithless stewardship of the affairs of the subsidiary by Standard to the detriment of the public investors. * * *" (308 U.S. 295, 308)

A brief supplemental statement of the facts dealt with in the cases relied on by petitioner will demonstrate how widely they differ from the facts in the instant case.

Petitioner omits to mention a transaction to which about two and one-half pages of the opinion in the *Deep Rock* case (306 U.S. 317-320) are devoted. This transaction involved the acquisition and subsequent manipulation of the "Bradstreet properties" and a cracking plant. The $9,000,000 of "advances" to Deep Rock referred to in the petitioner's brief contained such items as interest compounded monthly, management fees, and rental of properties which Standard had purchased for account of Deep Rock. Although the assets of Deep Rock appear never to have been in excess of $17,000,000, total debits against Deep Rock were $52,000,000, against which there were credits of $43,000,000. Total indebtedness of Deep Rock from 1925 to the time of bankruptcy was in excess of its assets. Deep Rock was continuously "two jumps ahead of the wolf" (306 U.S., at 310).

No such facts exist in the instant case.* Quite the contrary is shown. The Missouri Pacific control resulted in substantial benefits to the New Orleans. Its competitive position was strengthened (FF. 10, 11 and 12, R. 13-15), its properties greatly improved (FF. 9, R. 13), efficiency of operations increased (FF. 10 and 12, R. 13-15; R. 820, 821, 830 and 831; Ex. 249) and a foundation was laid which enabled the New Orleans expeditiously and profitably to handle the great increase in traffic which occurred during the War and thereafter (R. IV, 26; R. 1015). In further contrast to the situation in the *Deep Rock* case, the courts below found that the Missouri Pacific in its dealings with the New Orleans was careful to observe its fiduciary obligations as controlling stockholder (FF. 13-16, 33, R. 15-17, 24 and 25; CL. 11 and 13, R. 32 and 33).

In the *Commonwealth* case, the parent, Inland, sold an issue of bonds, referred to in the opinion as the "Inland bonds", which were secured by the pledge of all of the outstanding common stocks of five subsidiary operating companies, including Michigan. The balance sheet of Michigan at its organization represented this stock as having a stated value of $1,250,000 (141 F. 2d, at 738). The fact was, however, that if an initial unjustified write-up of $1,966,509 had been eliminated, Michigan's indebtedness would have exceeded the investment in the properties involved to the extent of $162,069. Against this investment of $2,203,845, Michigan had outstanding $2,000,000

* The so-called "saddling transaction", set forth beginning at page 9 of the petition, is an attempt to show improper conduct on the part of the Missouri Pacific. The statement of this transaction is incomplete and contains important errors. There is no citation to the specific findings with reference to this transaction (FF. 28, R. 22) and no attempt is made to show that the findings are incorrect.

of bonds and owed its parent, Inland, $365,914 (*ibid.*, at 737). This initial deficiency in the stated value of the stock wronged the Inland bondholders and was never corrected. Every loan thereafter made to Michigan and every dividend which it declared merely served to aggravate the original wrong done to the Inland bondholders.

Nothing comparable to these facts can be shown in the instant case. The consolidated balance sheet of the New Orleans and its subsidiaries as of December 31, 1925, the year in which it assumed control of the New Orleans, shows total assets of $60,000,000, capital of $15,000,000 and surplus of $7,000,000 (R. 266, 267). The consolidated balance sheet of the New Orleans and its subsidiaries as of August 31, 1931, near the end of the dividend paying period, shows total assets of $87,000,000, capital of $15,000,000 and surplus of approximately $8,000,000 (R. 81). As stated by the court below, the stock of the New Orleans pledged to secure the petitioner's Secured Serial Bonds "has been kept intact through depressions which wiped out vast amounts of such securities and of recognised value"* (R. IV, 27).

In his statements with reference to the intercompany claim and the adequacy of the capitalization of the New Orleans, the petitioner entirely omits to mention the supervision which the Commission exercised over the New Orleans under Section 20a of the Transportation Act (49 U.S.C.A. §20a). During the period of Missouri Pacific control, the New Orleans could not issue any of its First Mortgage Bonds without Commission approval. Issuance of the note representing $7,456,726 of the intercompany claim was authorized by the Commission under Section

* At the end of November, 1947, the New Orleans Common Stock was quoted at 105 bid, 112 asked and the Secured Serial Bonds were quoted at 106 bid, 108 asked (Bank and Quotation Record (W. B. Dana Co., New York, Dec. 6, 1947) pp. 53, 55).

20a (R. 86, 20839-20840). *New Orleans, Texas & Mexico Railway Company Notes*, Finance Docket No. 9817; 189 I.C.C. 600 (1933). In passing on the propriety of such authorization, the Commission was advised of the remaining notes evidencing the balance of the intercompany claim which had been issued under Section 20a(9). In granting such authority the Commission was required to and did find

> "* * * that such issue * * *: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." (49 U.S.C.A. §20a(2))

The courts below understood the rule of the *Deep Rock* and *Commonwealth* cases. Those cases involved a long history of mismanagement and faithless stewardship. In the instant case the courts below found the opposite to be true (FF. 33, R. 24; CL. 11, 13, R. 32-33). It seems clear that the conflict of decisions asserted by the petitioner "arises from differences in states of fact and not in the application of a principle of law." Accordingly, no question is presented which would warrant the granting of the writ.

C. The Contention that the New Orleans should have a Separate Trustee Presents no Important Question.

Point V of the petitioner's brief seems to suggest that a separate trustee for the New Orleans should be appointed, that he conduct a re-examination of the facts and that there be a new trial of the issues. Presumably the petitioner

would suspend the proceedings on the plan of reorganization, now scheduled for hearing before the Commission on January 27th next, while the issues revolving about the intercompany claim are being redetermined. This would almost inevitably be the result of following such a procedure since it would be difficult to formulate a plan without determination of the position of the intercompany claim among the hierarchy of claims. Such a result would not be in the public interest or in the interest of any of the creditors.

Neither the appointment of a separate trustee nor a retrial of the issues is necessary. The findings show that Mr. Thompson, as Trustee, made a very full and careful examination in the fulfillment of his duty under Section 77(c)(9) (FF. 34-37, 39, R. 25-27; CL. 17, R. 33). Moreover, the petitioner was given every opportunity both before and at the trial of the issues to obtain all of the available information bearing on his case (FF. 44, R. 29). This controversy involving the intercompany claim has already taken up a disproportionate amount of time in these proceedings. To further delay the reorganization by another trial of the same issues is unthinkable.

The petitioner fails to specify with any degree of particularity how he has been prejudiced by the fact that Mr. Thompson occupies dual offices. It is not asserted that Mr. Thompson has failed to act impartially or that his investigation pursuant to Section 77(c)(9) was inadequate.

Upon analysis Point V of the petitioner's brief presents no substantial issue of fact or of law. It is a mere complaint against Mr. Thompson, as Trustee, which, because of its errors and omissions, is not supported by the findings or the evidence. Certainly it presents no important question which would justify granting the writ.

POINT II

Determination in favor of the Petitioner of the questions presented by the petition will not result in a reversal of the decisions below.

This Court will consider only questions presented by the petition.

> Supreme Court Rules, Rule 38(2);
> *General Talking Pictures Corp.* v. *Western Electric Co., et al.*, 304 U.S. 175, 177-179 (1938);
> *Connecticut Railway & Lighting Co.* v. *Palmer, et al.*, 305 U.S. 493, 496 (1939).

The decisions below are based on two separate grounds not included in the four questions set forth on pages 13 and 14 of the petition. The omission of these grounds from the petition is tantamount to a concession by petitioner that they are not of such a nature as to justify granting the writ.

One of these grounds is laches (FF. 34-45, R. 25-29; CL. 15, R. 33; R. IV, 20, 23). The holding that the petitioner is barred by laches completely disposes of his case and is in itself a sufficient basis for the decisions below. The other separate ground on which the decisions below were based rests upon the District Court's findings that the RFC and RCC were bona fide pledgees for value of $9,555,226.78 principal sum of the intercompany claim (CL. 3, 4 and 7, R. 30, 31). Although the RFC and RCC claims have since been paid, the order authorizing payment subrogated the First and Refunding Mortgage bondholders and other Missouri Pacific creditors to the extent of their interest (R. 1188, Ex. 335-357), to the lien of the RFC and

the RCC on the pledged collateral, including the pledged portion of the intercompany claim (R. 1157 and 1165).

Thus, a determination in favor of the petitioner of the questions presented in the petition for certiorari will not result in a reversal of the order overruling the petitioner's Objection 19. It is not believed that this Court will wish to add to its already crowded docket a case which presents questions, the answering of which will not decide the ultimate issue. Boskey, *Mechanics of the Supreme Court's Certiorari Jurisdiction*, 46 Col. L.R. 255, 259 (1946).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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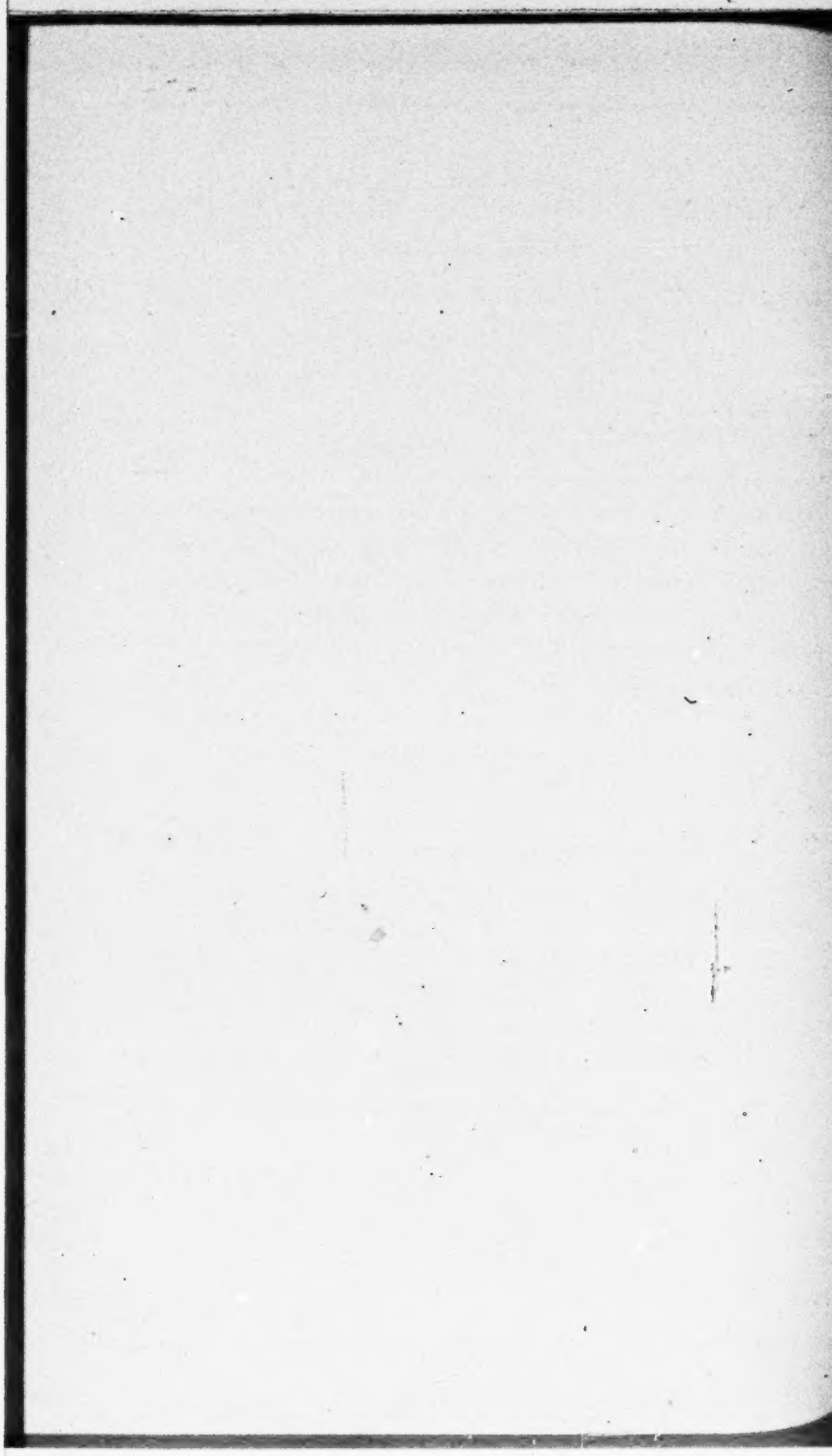

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> "Petitioner seeks no re-examination of the facts. To a remarkable extent the facts, *arising* almost entirely from books of account and corporate records, are undisputed." (Italics supplied) (Brief, 33)

Heretofore petitioner has been unwilling to accept the facts as shown in the books of account and records to which he refers. He has contended throughout that the books and records in evidence were improperly kept and concealed the true condition of the New Orleans (R. 240, 516; Par. 73, R. 50). The statement of facts in the petition and brief, which conflicts in many important respects with the findings of fact, is a refutation of the petitioner's assertion that there is no dispute as to the evidence. It is clear that the petitioner is unwilling to present his case to this Court on the facts as found in the District Court. Of necessity this is true. The findings of fact of the District Court do not warrant the granting of the subordination which the petitioner seeks.

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This is especially true where the petitioner fails to point out wherein the trial court erred in making findings of fact.

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The petitioner contends that the decision of the Circuit Court of Appeals is in conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit in *In re Commonwealth Light & Power Co.*, 141 F. 2d 734 (1944) and with the decision of this Court in *Taylor* v. *Standard Gas & Electric Co.*, 306 U.S. 307 (1939). (See Questions 1, 2 and 3, Petition pp. 13-14 and Reasons 1, 2 and 3, Petition pp. 14-15.)

This contention is based in part on petitioner's assertion that the decision in each of these cases required subordination of the claim of an insolvent parent against a subsidiary (Questions 2 and 3; Petition pp. 14, 28). The petitioner has misconceived the decision of the courts below. The holding was that the Missouri Pacific in its dealings with the New Orleans had complied with its fiduciary obligations as a controlling stockholder (CL. 11, 13, R. 32, 33; FF. 33, R. 24-25). Because there was no ground for subordination, it was unnecessary for the courts below to decide the interesting questions set forth in paragraphs 2 and 3 at page 14 of the petition.

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> "* * * This was based on the equities of the case—the history of spoliation, mismanagement and faithless stewardship of the affairs of the subsidiary by Standard to the detriment of the public investors. * * *" (308 U.S. 295, 308)

A brief supplemental statement of the facts dealt with in the cases relied on by petitioner will demonstrate how widely they differ from the facts in the instant case.

Petitioner omits to mention a transaction to which about two and one-half pages of the opinion in the *Deep Rock* case (306 U.S. 317-320) are devoted. This transaction involved the acquisition and subsequent manipulation of the "Bradstreet properties" and a cracking plant. The $9,000,000 of "advances" to Deep Rock referred to in the petitioner's brief contained such items as interest compounded monthly, management fees, and rental of properties which Standard had purchased for account of Deep Rock. Although the assets of Deep Rock appear never to have been in excess of $17,000,000, total debits against Deep Rock were $52,000,000, against which there were credits of $43,000,000. Total indebtedness of Deep Rock from 1925 to the time of bankruptcy was in excess of its assets. Deep Rock was continuously "two jumps ahead of the wolf" (306 U.S., at 310).

No such facts exist in the instant case.* Quite the contrary is shown. The Missouri Pacific control resulted in substantial benefits to the New Orleans. Its competitive position was strengthened (FF. 10, 11 and 12, R. 13-15), its properties greatly improved (FF. 9, R. 13), efficiency of operations increased (FF. 10 and 12, R. 13-15; R. 820, 821, 830 and 831; Ex. 249) and a foundation was laid which enabled the New Orleans expeditiously and profitably to handle the great increase in traffic which occurred during the War and thereafter (R. IV, 26; R. 1015). In further contrast to the situation in the *Deep Rock* case, the courts below found that the Missouri Pacific in its dealings with the New Orleans was careful to observe its fiduciary obligations as controlling stockholder (FF. 13-16, 33, R. 15-17, 24 and 25; CL. 11 and 13, R. 32 and 33).

In the *Commonwealth* case, the parent, Inland, sold an issue of bonds, referred to in the opinion as the "Inland bonds", which were secured by the pledge of all of the outstanding common stocks of five subsidiary operating companies, including Michigan. The balance sheet of Michigan at its organization represented this stock as having a stated value of $1,250,000 (141 F. 2d, at 738). The fact was, however, that if an initial unjustified write-up of $1,966,509 had been eliminated, Michigan's indebtedness would have exceeded the investment in the properties involved to the extent of $162,069. Against this investment of $2,203,845, Michigan had outstanding $2,000,000

* The so-called "saddling transaction", set forth beginning at page 9 of the petition, is an attempt to show improper conduct on the part of the Missouri Pacific. The statement of this transaction is incomplete and contains important errors. There is no citation to the specific findings with reference to this transaction (FF. 28, R. 22) and no attempt is made to show that the findings are incorrect.

of bonds and owed its parent, Inland, $365,914 (*ibid.*, at 737). This initial deficiency in the stated value of the stock wronged the Inland bondholders and was never corrected. Every loan thereafter made to Michigan and every dividend which it declared merely served to aggravate the original wrong done to the Inland bondholders.

Nothing comparable to these facts can be shown in the instant case. The consolidated balance sheet of the New Orleans and its subsidiaries as of December 31, 1925, the year in which it assumed control of the New Orleans, shows total assets of $60,000,000, capital of $15,000,000 and surplus of $7,000,000 (R. 266, 267). The consolidated balance sheet of the New Orleans and its subsidiaries as of August 31, 1931, near the end of the dividend paying period, shows total assets of $87,000,000, capital of $15,000,000 and surplus of approximately $8,000,000 (R. 81). As stated by the court below, the stock of the New Orleans pledged to secure the petitioner's Secured Serial Bonds "has been kept intact through depressions which wiped out vast amounts of such securities"* (R. IV, 27).

In his statements with reference to the intercompany claim and the adequacy of the capitalization of the New Orleans, the petitioner entirely omits to mention the supervision which the Commission exercised over the New Orleans under Section 20a of the Transportation Act (49 U.S.C.A. §20a). During the period of Missouri Pacific control, the New Orleans could not issue any of its First Mortgage Bonds without Commission approval. Issuance of the note representing $7,456,726 of the intercompany claim was authorized by the Commission under Section

* At the end of November, 1947, the New Orleans Common Stock was quoted at 105 bid, 112 asked and the Secured Serial Bonds were quoted at 106 bid, 108 asked (Bank and Quotation Record (W. B. Dana Co., New York, Dec. 6, 1947) pp. 53, 55).

20a (R. 86, 20839-20840). *New Orleans, Texas & Mexico Railway Company Notes,* Finance Docket No. 9817; 189 I.C.C. 600 (1933). In passing on the propriety of such authorization, the Commission was advised of the remaining notes evidencing the balance of the intercompany claim which had been issued under Section 20a(9). In granting such authority the Commission was required to and did find

> "* * * that such issue * * *: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." (49 U.S.C.A. §20a(2))

The courts below understood the rule of the *Deep Rock* and *Commonwealth* cases. Those cases involved a long history of mismanagement and faithless stewardship. In the instant case the courts below found the opposite to be true (FF. 33, R. 24; CL. 11, 13, R. 32-33). It seems clear that the conflict of decisions asserted by the petitioner "arises from differences in states of fact and not in the application of a principle of law." Accordingly, no question is presented which would warrant the granting of the writ.

C. The Contention that the New Orleans should have a Separate Trustee Presents no Important Question.

Point V of the petitioner's brief seems to suggest that a separate trustee for the New Orleans should be appointed, that he conduct a re-examination of the facts and that there be a new trial of the issues. Presumably the petitioner

would suspend the proceedings on the plan of reorganization, now scheduled for hearing before the Commission on January 27th next, while the issues revolving about the intercompany claim are being redetermined. This would almost inevitably be the result of following such a procedure since it would be difficult to formulate a plan without determination of the position of the intercompany claim among the hierarchy of claims. Such a result would not be in the public interest or in the interest of any of the creditors.

Neither the appointment of a separate trustee nor a retrial of the issues is necessary. The findings show that Mr. Thompson, as Trustee, made a very full and careful examination in the fulfillment of his duty under Section 77(c)(9) (FF. 34-37, 39, R. 25-27; CL. 17, R. 33). Moreover, the petitioner was given every opportunity both before and at the trial of the issues to obtain all of the available information bearing on his case (FF. 44, R. 29). This controversy involving the intercompany claim has already taken up a disproportionate amount of time in these proceedings. To further delay the reorganization by another trial of the same issues is unthinkable.

The petitioner fails to specify with any degree of particularity how he has been prejudiced by the fact that Mr. Thompson occupies dual offices. It is not asserted that Mr. Thompson has failed to act impartially or that his investigation pursuant to Section 77(c)(9) was inadequate.

Upon analysis Point V of the petitioner's brief presents no substantial issue of fact or of law. It is a mere complaint against Mr. Thompson, as Trustee, which, because of its errors and omissions, is not supported by the findings or the evidence. Certainly it presents no important question which would justify granting the writ.

POINT II

Determination in favor of the Petitioner of the questions presented by the petition will not result in a reversal of the decisions below.

This Court will consider only questions presented by the petition.

> Supreme Court Rules, Rule 38(2);
> *General Talking Pictures Corp.* v. *Western Electric Co., et al.*, 304 U.S. 175, 177-179 (1938);
> *Connecticut Railway & Lighting Co.* v. *Palmer, et al.*, 305 U.S. 493, 496 (1939).

The decisions below are based on two separate grounds not included in the four questions set forth on pages 13 and 14 of the petition. The omission of these grounds from the petition is tantamount to a concession by petitioner that they are not of such a nature as to justify granting the writ.

One of these grounds is laches (FF. 34-45, R. 25-29; CL. 15, R. 33; R. IV, 20, 23). The holding that the petitioner is barred by laches completely disposes of his case and is in itself a sufficient basis for the decisions below. The other separate ground on which the decisions below were based rests upon the District Court's findings that the RFC and RCC were bona fide pledgees for value of $9,555,226.78 principal sum of the intercompany claim (CL. 3, 4 and 7, R. 30, 31). Although the RFC and RCC claims have since been paid, the order authorizing payment subrogated the First and Refunding Mortgage bondholders and other Missouri Pacific creditors to the extent of their interest (R. 1188, Ex. 335-357), to the lien of the RFC and

the RCC on the pledged collateral, including the pledged portion of the intercompany claim (R. 1157 and 1165).

Thus, a determination in favor of the petitioner of the questions presented in the petition for certiorari will not result in a reversal of the order overruling the petitioner's Objection 19. It is not believed that this Court will wish to add to its already crowded docket a case which presents questions, the answering of which will not decide the ultimate issue. Boskey, *Mechanics of the Supreme Court's Certiorari Jurisdiction*, 46 Col. L.R. 255, 259 (1946).

CONCLUSION

he petition should be denied.

Respectfully submitted,

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